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In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 254.

JAMES A. FREAR, in his capacity as Secretary of State of the State of Wisconsin,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLEE.

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SUBJECT INDEX.

PAGE

Statement 1

ARGUMENT.

I.

THE STATUTE IS UNCONSTITUTIONAL GENERALLY:

(1) Because it is a direct attempt to limit and restrict the judicial power of the United States;

(2) Because it requires a stipulation in advance not to exercise a Federal right;

(3) Because it discriminates between foreign corporations on the one hand and domestic corporations and individuals (resident or non-resident) on the other 2

(1)

Because it is an attempt to limit the judicial power of the United States..... 2

Present status of the Prewitt case as an authority 10

(2)

Because the statute requires a stipulation in advance not to exercise a Federal right.... 14

(3)

Because the statute discriminates against foreign corporations 19

II.

PAGE

The statute is unconstitutional at all events as to this appellee, because appellee is not within the class of foreign corporations which the State may arbitrarily exclude from the privileges of domestic business:

(1) Because it is an interstate telegraph company;

(2) Because it is a Federal postal agent..... 23

(1)

Appellee an interstate telegraph company.... 23

(2)

Appellee a Federal postal agent..... 26

CONCLUSION:

The temporary injunction order should be affirmed with costs..... 32

CASES CITED.

PAGE

Barron v. Burnside, 121 U. S. 186..... 14
Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318.....3, 4, 13, 25
Herndon v. Chicago, Rock Island & Pacific R. R. Co., 218 U. S. 135.....3, 22
Home Insurance Co. v. Morse, 20 Wall. 447.. 14
Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75..... 28
Ludwig v. Western Union Telegraph Co., 216 U. S. 146..... 11
Mercantile Trust Co. v. Texas & Pacific R. R. Co., 216 Fed Rep. 225..... 30
Mercantile Trust Co. v. Texas & Pacific R. R. Co., 223 U. S. 710..... 30
Missouri Pacific Railway Co. v. Larabee, 234 U. S. 459.....8, 11, 13
New York Life Insurance Co. v. Head, 234 U. S. 149.....6, 11, 13
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1.....27, 29
Phoenix Insurance Co. v. McMasters, 237 U. S. 63 7
Pullman Company v. Kansas, 216 U. S. 56..11, 12
Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246.....3, 11
Southern Pacific Co. v. Denton, 146 U. S. 202. 14
Southern Railway Co. v. Greene, 216 U. S. 400 .....11, 20
Western Union Telegraph Co. v. Kansas, 216 U. S. 1.....10, 11, 18, 23
Western Union Telegraph Co. v. Massachusetts, 125 U. S 530..... 27
Western Union Telegraph Co. v. Texas, 105 U. S. 460..... 27
Williams v. Talladega, 226 U. S. 404.....27, 28

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 254.

JAMES A. FREAR, in his capacity as Secretary of the State of Wisconsin,

Appellant,

against

THE WESTERN UNION TELEGRAPH COMPANY,

Appellee.

Statement.

This appeal involves simply the question of the constitutionality, as to this appellee, of a statute of Wisconsin providing that if it should remove a case to the Federal court, where the cause of action arose within the State, appellee's license to do a domestic business should be revoked and it should be subjected to fines and penalties for continuing thereafter to carry on domestic business without the license.

The question has been so fully discussed and so thoroughly settled—and that so recently—by decisions of this court that counsel for appellee do not believe that the court will wish to hear argument on this side; and this brief will be confined to a short statement of four or five well settled principles of law, any one of which singly should sustain the injunction order appealed from.

It will be assumed that there is no question as to the jurisdiction of the court below, or as to the

propriety of the relief granted, in the form which that relief took, if the statute in question is unconstitutional. No question of that kind was raised below, nor is any raised by the Attorney General of Wisconsin in his brief here. The sole question therefore is whether the statute of Wisconsin, which is printed as an appendix to the Attorney General's brief, was in conflict with the Constitution and laws of the United States.

ARGUMENT.

I.

The statute is unconstitutional generally:

(1) Because it is a direct attempt to limit and restrict the judicial power of the United States;

(2) Because it requires a stipulation in advance not to exercise a Federal right;

(3) Because it discriminates between foreign corporations on the one hand and domestic corporations and individuals (resident or non-resident) on the other.

(1)

Because it is an attempt to limit the judicial power of the United States.

This court has always sought with peculiar zeal to safeguard the Federal rights, including the right of removal to the Federal court in a proper case, of foreign corporations, as well as of other persons. The problem has been how logically to safeguard those rights without denying or impair-

ing the complementary right of the State, with respect at least to foreign corporations not engaged in interstate commerce, to exercise the absolute power of exclusion if it sees fit, and a *fortiori* to impose unreasonable or offensive conditions on such corporations as the price of permitting them to enter or remain, on the principle that where the absolute power of exclusion exists its exercise cannot be forbidden because the State assigns for such exercise a poor reason or none.

The solution to this problem, foreshadowed by Mr. Justice DAY in his dissenting opinion in *Security Mutual Life Insurance Company* v. *Prewitt*, but not then persuasive with the majority of the court, seems to have been clearly developed in the later decisions, and finally placed beyond the realm of doubt or argument by *Herndon* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 135, and *Harrison* v. *St. Louis & San Francisco Railroad*, 232 U. S. 318.

In the Herndon case, holding unconstitutional a statute of Missouri providing for the ouster of an interstate railway company from the privilege of domestic business provided it should bring an action in the Federal court or remove one thereto, Justice DAY said (p. 158):

> "In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.
>
> "It is enough now to say that within the principles decided at this term, in the cases

cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void."

In Harrison against St. Louis & San Francisco Railroad, the CHIEF JUSTICE, writing for a unanimous court, holding unconstitutional an act of Oklahoma which it was conceded was intended to prevent the removal of causes from the State to a court of the United States, said (pp. 328, 329, 331-333):

"It may not be doubted that THE JUDICIAL POWER OF THE UNITED STATES as created by the Constitution and provided for by Congress pursuant to its constitutional authority, IS A POWER WHOLLY INDEPENDENT OF STATE ACTION and which therefore the several STATES MAY NOT BY ANY EXERTION OF AUTHORITY IN ANY FORM, DIRECTLY OR INDIRECTLY, DESTROY, ABRIDGE, LIMIT OR RENDER INEFFICACIOUS. * * * The right unrestrained and unpenalized by State action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court is obviously of the very essence of the right to remove conferred by the law of the United States. * * * Coming then to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground of diversity of citizenship in the contingency contemplated, punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempts to divest the Federal courts of their power to determine, if is-

sue arises on the subject, whether there is a right to remove. Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the State court, it in effect commands the judge of such court on the making of the application to refuse the same and to certify the fact that it was made to a State executive officer to the end that such officer should without judicial action strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the court below. * * * The proposition that the constitutionality of the statute and the action taken under it is supported by the decisions in *Doyle* v. *Continental Insurance Company*, 94 U. S. 535, and *Security Company* v. *Prewitt*, 202 U. S. 246, is we think plainly unfounded. Those cases involved State legislation as to a subject over which there was complete State authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State

> over the subject dealt with does not exist has since been so repeatedly passed upon as to cause the question not to be open. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, ib. 56; *Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and *Herndon* v. *C. R. & I. P. Ry.*, 218 U. S. 135. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the Doyle and Prewitt cases, and render their inapplicability to this case certain. INDEED, THE RULING IN THE HERNDON CASE AND IN THOSE SUBSEQUENT TO THE DOYLE AND PREWITT CASES, MOST OF WHICH WERE REVIEWED IN THE HERNDON CASE, DEMONSTRATES THAT NO AUTHORITY IS AFFORDED BY THOSE TWO CASES FOR THE CONCEPTION THAT IT IS WITHIN THE POWER OF A STATE IN ANY FORM, DIRECTLY OR INDIRECTLY, TO DESTROY OR DEPRIVE OF A RIGHT CONFERRED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES."

In *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, 164, the process of discrediting the Prewitt case, or what is left of it, continues:

> "It is true it has been held that in view of the power of a State over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the State, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever for any purpose to go in business without a license would not

> be heard after accepting the same to complain of exactions upon which the license was conditioned as unconstitutional because of its voluntary submission to the same. But even if it be put out of view that THIS DOCTRINE HAS BEEN EITHER EXPRESSLY OR BY NECESSARY IMPLICATION OVERRULED OR AT ALL EVENTS SO RESTRICTED AS TO DEPRIVE IT OF ALL APPLICATION TO THIS CASE (See *Harrison* v. *St. Louis & San Francisco Railroad Co.*, 232 U. S. 332, and authorities there cited), it here can have no possible application since such doctrine at best but recognized the power of a State under the circumstances stated to impose conditions upon the right to do the business embraced by the license and therefore gives no support to the contention here presented, which is that a State by a license may acquire the right to exert an authority beyond its borders, which it cannot exercise consistently with the Constitution."

In *Phoenix Insurance Co.* v. *McMaster*, 237 U. S. 63, 71, the court sustained a South Carolina statute excluding foreign insurance companies which had not made certain required investments or deposits within the State, but with the following carefully expressed limitation:

> "Furthermore, the Phoenix Company is a foreign corporation, whose license to do business in the State of South Carolina would expire upon the first day of April, 1912, and, therefore, it was within the power of the State, SO LONG AS IT DID NOT IMPOSE UPON THE COMPANY AS A CONDITION OF DOING BUSINESS WITHIN THE STATE ANY DEPRIVATION OF RIGHTS SECURED TO IT UNDER

> THE FEDERAL CONSTITUTION, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the insurance company, being within that class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State, SO LONG AS NO RIGHTS CONFERRED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES WERE DESTROYED OR ABRIDGED."

In *Missouri Pacific Railway Co.* v. *Larabee*, 234 U. S. 459, the court refused to sustain a statute of Kansas in so far as it authorized the allowance of attorneys' fees for services in this court for opposing an unsuccessful appeal thereto. Of this remarkable attempt by the State of Kansas to discourage resort to a Federal court—differing in principle from the Wisconsin statute only in that it was aimed at the highest Federal court instead of district courts of the United States—the CHIEF JUSTICE said (p. 471):

> "It would follow of course that the right to freely seek access to the Supreme Court of the United States would cease to exist, since it would be in the power of the States to burden that right to such a degree as to render its exercise impossible. How better could this be illustrated than by the case before us, that is, by the necessary implication that there would have been power in the court below if it had deemed it just to do so, to award the claim which was made for $75,000 attorneys' fees for services rendered in this court! Indeed, in the argument

> at bar it was freely conceded that it may well have been that the mainspring which caused the adoption of the statute relied upon was the deterrent influence which it would produce in the prosecution of writs of error to this court. * * * We shall reason no further, and shall content ourselves with pointing out that in substance and effect the absolute want of foundation for the contention here made has been in express terms foreclosed. For instance, at this term in *Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, a statute of the State of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution and the destructive effect of such legislation upon our institutions was pointed out."

The point then is, as is apparent from these later decisions, that a State statute which directly attacks the jurisdiction of the United States courts is unconstitutional for that reason alone, without reference to its effect on the particular litigant whose recourse to those courts it is sought to curtail, or to the jurisdiction of the State over such litigant. It is unconstitutional not because of the contract clause, or the commerce clause, or the due process clause, but because it is an attack on, and to that extent in conflict with, the clause of the Constitution prescribing the extent of the judicial power of the United States, and the Acts of Congress passed in pursuance thereof. The difficulty of the majority of the court in the Prewitt case was that, as the State had the absolute power of exclusion and—*a fortiori*—the power to refuse to admit except upon unreasonable and offensive conditions, the foreign corporation in that case had no Federal right which IT could successfully assert

against the State. The embarrassment disappears and a clear way is pointed out to avoid State legislation of this vicious character if we approach the question, as is done in the Herndon and Harrison cases, from the point of view of the judiciary article of the Constitution and of the rights of the courts of the United States to exercise their allotted jurisdiction without interference from any State, rather than from the point of view of the right of the foreign corporation to insist, as against the State, that IT be admitted or allowed to continue business.

Present Status of the Prewitt Case as an Authority.

It may be that the Prewitt case is still law as far as corporations not engaged in interstate commerce are concerned. It may be that it is still law, even as to that class of corporations, only on the precise state of facts actually involved in the record in that case—namely, cases in which, at the time of the foreign corporation's application for admission to the State, the objectionable statute was in existence, so that the corporation came into the State with notice of the condition, offensive though it might be, for breach of which it would be thereafter expelled. It is certain that in the later cases the court has, with some pains and manifest inconvenience, avoided the explicit statement that the Prewitt case is absolutely overruled. Yet it does not seem that for practical purposes the Prewitt case can today be regarded as having any vitality as an authority.

In his dissenting opinion in *Western Union Telegraph Company* v. *Kansas*, in which the CHIEF JUSTICE and Justices MCKENNA and PECKHAM concurred, Justice HOLMES used the following signifi-

cant language with respect to the future of the Prewitt case and its doctrine:

> "I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for REGRET THAT THE COURT SHOULD SO SOON ABANDON ITS LATEST DECISION, *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246."

In the group of cases involving questions closely akin to that in the case at bar which were decided almost simultaneously in January, 1910, and reported in 216 U. S.—namely, *Western Union Telegraph Company* v. *Kansas, Pullman Company* v. *Kansas, Ludwig* v. *Western Union Telegraph Company*, and *Southern Railway Company* v. *Greene* —the alignment of the court was in each case the same—the then CHIEF JUSTICE, Mr. Justice McKENNA and Mr. Justice HOLMES dissenting; and the dissenting opinion in the Kansas case, it may be safely assumed, is to be regarded as expressing the views of the minority of the court in them all.

But there were no dissents in the Herndon or the Harrison cases (both of which are more directly inconsistent with the Prewitt case than was *Western Union Telegraph Company* v. *Kansas*), or in *New York Life Insurance Company* v. *Head*, or *Missouri Pacific Railway Company* v. *Larabee;* and the absence of any division can be explained, it would seem, only on the ground that the principles which the minority had deemed inconsistent with *Security Mutual Life Insurance Company* v. *Prewitt* had become so definitely established by the group of decisions in 216 U. S. that it had thereafter become the duty of the minority as well as of the majority in those cases to apply those decisions as law.

In his concurring opinion in *Pullman Company* v. *Kansas* the present CHIEF JUSTICE wrote (216 U. S. 74):

> "When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous ruling of the court, however much as an original question I would have held a contrary view."

Similarly it seems that whatever original differences may have existed as to the doctrine of the Prewitt case, it has no longer any practical place in our constitutional law, unless possibly as applied to the single case of a corporation engaged in domestic commerce only, which is WARNED OF THE OFFENSIVE CONDITION BEFORE IT ENTERS THE STATE. And whether it can still be law even within such a limited field seems problematical, in view of the language of the CHIEF JUSTICE in the Harrison case, writing for a unanimous court:

> "Indeed, the ruling in the Herndon case and in those subsequent to the Doyle and Prewitt cases, most of which were reviewed in the Herndon case, demonstrates that no AUTHORITY IS AFFORDED BY THOSE TWO CASES FOR THE CONCEPTION THAT IT IS WITHIN THE POWER OF A STATE in any form, DIRECTLY OR INDIRECTLY, to destroy or DEPRIVE OF A RIGHT CONFERRED BY THE CONSTITUTION and laws of the United States"—

and of the further implication, in *New York Life*

Insurance Company v. *Head* (*supra*), that the Prewitt doctrine

> "has been either expressly or by necessary implication overruled or at all events so restricted as to deprive it of all application"

to that case—with a further reference to Harrison against St. Louis & San Francisco Railroad Company.

The Attorney General of Wisconsin refers lightly to the Harrison case and wisely makes no attempt to distinguish it or to explain the language quoted above. The opinions in *Missouri Pacific Railway* v. *Larabee* and *New York Life Insurance Company* v. *Head* have been handed down since the decision below, but he still more wisely makes no reference to them. The Herndon case he seeks to distinguish on the ground (see his brief, page 44) that the Missouri statute considered in the Herndon case prohibited the foreign corporation from bringing any suit in the Federal court as well as from removing cases to the Federal court from the State court, while the statute in the case at bar prohibits removal only, and that only in cases where the cause of action arose within the State. But of course this cannot be the basis of any sound distinction. You cannot deny the right of the State to interfere substantially with the jurisdiction of the Federal court and at the same time permit it to interfere a little bit. It was broadly announced in the Harrison case that the judicial power of the United States is "wholly independent of State action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, ABRIDGE, LIMIT or render inefficacious." An attempt to abridge or to limit is as vicious as an attempt to destroy. If this were not so, it might as well be argued that a statute would be consti-

tutional which forbade removals to the Federal courts only on Mondays, Wednesdays and Fridays and permitted them on the other days of the week; or we might even have the spectacle of a State which cannot forbid removals to the Federal court generally prescribing an open and close season for such removals, as in the case of game.

We conclude therefore that even if the Western Union Telegraph Company had no better rights than an insurance company, the Wisconsin act in question ought, in line with the modern trend of thought as evidenced by the latest decisions of the court, to be treated as invalid; especially as the act was not in existence when the company entered the State.

(2)

Because the statute requires a stipulation in advance not to exercise a Federal right.

This was the somewhat narrow ground of the decision below. While narrow it seems, as far as this particular record is concerned, to be unanswerable.

It is conceded by everybody, the Attorney General included, that even the Prewitt case does not authorize the State to require, as a condition of admitting a foreign corporation to the State or permitting it to remain therein, that the foreign corporation shall AGREE IN ADVANCE not to remove cases to the Federal court.

Home Ins. Co. v. *Morse,* 20 Wall. 447.
Barron v. *Burnside,* 121 U. S. 186.
Southern Pacific Co. v. *Denton,* 146 U. S. 202.

The court below said (Record, pp. 22, 23):

> "The statute provides that the foreign corporation, as a condition of doing business in the State, or continuing it, shall state in its application to come in, and its annual sworn reports, that it will comply with all the laws of the State relative to foreign corporations.
>
> "One of these laws provides that if the corporation shall avail itself of the right of removal it shall lose its local license. The question is whether the company, thus compelled to state that it will comply with the local law, is in substance compelled to contract, as a condition of its admission or continued presence in the State, that it will not exercise its constitutional right of removal, but consent to litigate certain cases only in the State court. * * * The question is whether section 1770F is substantially a command or prohibition to refrain from taking a removal. It is evident that such a stipulation in the ordinary private contract would not be a prohibition, but merely a condition. But contracts such as those here in question are not between citizens or subjects, but between a political superior and a subject—between the State as a local sovereignty and a citizen or subject of another State. The object of such statutes is public policy. The corporation cannot elect whether it will stay out, being practically coerced to come in by threatened loss of contract and property rights. The parties are by no means on equal terms. One is a sovereign, dictating what the subject, in these cases lawfully in the State for some purposes, shall do if it remains therein for other

purposes closely related. So when the State enacts that if the subject does something it has a perfect abstract right to do it shall be punished, it is thereby substantially prohibited. The Federal penal code of 1909 (35 Stat. 1089, Comp. Stats. 1911, Sup. 1590) contains very few express commands. Most of its sections provide that whoever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited. No one would contend that these were not commands to refrain from those acts. They are prohibitions from a political superior to a subject, enacted for the public welfare. The State says to the telegraph company or coal company, 'You are in the State lawfully for interstate and government business. If, however, you do any other kind of business you must have a local license. If you remove to a Federal court any case, whether in your interstate or local business, brought against you by a citizen of Wisconsin on a cause of action arising therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest any title.' This is a substantial command or prohibition. It is the same as saying, 'You shall not remove such a case.'

"In the Morse case (20 Wall. 445) there was an express stipulation not to remove actions against the company. But in the Burnside case (121 U. S. 186) the prohibition was implied, as it is here. The application of the foreign corporation to be

> permitted to do business in Iowa was required to contain a stipulation 'that said permit shall be subject to each of the provisions' of the foreign corporation statute. A removal to a Federal court by the corporation was made a forfeiture of the permit. No application had ever been made by the company to be permitted to do business in the State, and one of its servants was arrested for running an interstate train in Iowa. The court said: 'The locomotive engineer is arrested for acting as such in the employment of the corporation because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State court, as a condition of obtaining a permit, and consequently has not obtained such permit. * * * As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States the statute requiring the permit has been held to be void.' This decision has been many times approved by the Supreme Court and Circuit Courts of Appeals. The citing cases are discussed by Mr. Justice DAY in the dissenting opinion in the Prewitt case *supra*.
>
> "Being unable to distinguish these cases from the Burnside decision, the duty to grant the application for a preliminary injunction is plain."

The Attorney General of Wisconsin seeks to escape from the force of this reasoning by insisting that it was not contrary to the law of Wisconsin for the appellee to remove a case to the Federal court (Brief, p. 55.):

> "It thus appears that the foreign corporation may comply with this law when it removes the case as well as when it does not remove the case. It is given the option to remove it or to refrain from removing it. If it removes the case it is still within its rights under the statute and is complying with the law."

But it is idle to say that one is complying with the law in performing an act for the performance of which he may be subjected, by law, to severe and burdensome, not to say murderous, penalties. That the deprivation of the right to do a local business in the case of such a corporation as the appellee is a severe penalty cannot be disputed on theory, and has been the subject of express decision in many of the later cases. As the present CHIEF JUSTICE said in the Kansas case (216 U. S. p. 50):

> "This cause is concerned, not with the power of the State to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the State TO CONFISCATE THE PROPERTY OF THE CORPORATION already within the State and which has been there for years. * * * The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. THE STATE LAW TAKES THE PROPERTY, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden. * * * If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of do-

> ing the local business becomes worthless AND IS IN EFFECT CONFISCATED. If, on the other hand, the unconstitutional burden be borne, A LIKE RESULT TAKES PLACE."

It is idle to say that an act is permitted by law and is not a violation of law simply because the letter of the statute, instead of in terms prohibiting the performance of the act, simply provides that in case any one does the act his property shall be confiscated. That is the language used to define crime in many penal codes besides the Federal penal code referred to by the court below.

(3)

Because the statute discriminates against foreign corporations.

The statute absolutely forbids removal of a case to the Federal court where the cause of action arose within the State. It does not provide that such suits shall not be removed on the ground of diversity of citizenship merely; it provides that they shall not be removed at all. A domestic corporation or an individual of course can remove a case to the Federal court in the first instance, even though the cause of action arose within the State, if a question arising under the Constitution and laws of the United States is involved and if the amount in controversy exceeds three thousand dollars, without being subjected to any penalty. This obvious discrimination, of itself, is sufficient to invalidate the statute. The legislature of Wisconsin can no more deprive a foreign corporation which has acquired permanent property and is conducting a permanent business within the State, with the State's previous permission and sanction, of the right to avail itself of certain methods of de-

fense which are available in similar cases to domestic corporations and individuals, than it can levy on such a foreign corporation a discriminatory tax.

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 413, in denying the right of the State to collect a tax from a foreign corporation not imposed on domestic corporations of the same class, the court said:

> "It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State; nor with one which has come into the State upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the State and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the State. This feature of the case was dealt with by Mr. Justice BREWER, then a Circuit Judge, in the case of *Ames* v. *Union Pacific R. R. Co.*, 64 Fed. Rep. 165, 177, wherein he said:
>
> "'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transporta-

tion, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value.' * * *

"We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business. * * * It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protec-

> tion of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

In the Herndon case (*supra*), identical in this respect with the case at bar, the court said (p. 158):

> "Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy A DOMESTIC RAILROAD COMPANY might bring an action in the Federal court, OR IN A PROPER CASE REMOVE ONE THERETO, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. * * * It is enough now to say that within the principles decided at this term, in the cases cited above, the Act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void."

II.

The statute is unconstitutional at all events as to this appellee, because appellee is not within the class of foreign corporations which the State may arbitrarily exclude from the privileges of domestic business:

(1) Because it is an interstate telegraph company;

(2) Because it is a Federal postal agent.

The threatened exclusion of the appellee is confessedly arbitrary. It is not pretended that the appellee has been guilty of any *improper* act which would justify its exclusion: it is even insisted by the Attorney General, as heretofore pointed out, that the appellee has neither broken nor threatened to break any law, constitutional or otherwise, of the State. He says in his brief, we repeat (p. 55):

> "If it removes the case it is still within its rights under the statute and is complying with the law. If it does not remove the case it is also complying with the law."

It is settled that with respect to the arbitrary power of exclusion from the privilege of domestic business all corporations are divided into two classes: those with respect to which the arbitrary power exists, and those with respect to which it does not exist.

(1)

Appellee an interstate telegraph company.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, Justice HARLAN said (pp. 33, 37, 45, 46):

> "But it is said to be well settled that a

State, in the exercise of its reserved powers, may prescribe the terms on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits.

"It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But THOSE WERE CASES IN WHICH THE PARTICULAR FOREIGN CORPORATION before the court WAS ENGAGED IN ORDINARY BUSINESS AND NOT DIRECTLY OR REGULARLY IN INTERSTATE OR FOREIGN COMMERCE. * * * We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. * * * THE VITAL DIFFERENCE BETWEEN THE PREWITT CASE AND THE ONE NOW BEFORE US is THAT THE BUSINESS OF THE INSURANCE COMPANY, involved in the former case, WAS NOT, as this court has often adjudged, INTERSTATE COMMERCE, WHILE THE BUSINESS OF THE TELEGRAPH COMPANY WAS PRIMARILY

AND MAINLY THAT OF INTERSTATE COMMERCE. A decision, such as was rendered in the Prewitt case, that a State could, with or without reason and without violating the Constitution, revoke its permit to a foreign insurance company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a State may prescribe such regulations as to corporations of other States engaged in both interstate and local business"—etc.

In *Harrison* v. *St. Louis & San Francisco Railroad* (232 U. S. 318, 332), the CHIEF JUSTICE said:

"The proposition that the constitutionality of the statute, and the action taken under it, is supported by the decisions in *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, and *Security Co.* v. *Prewitt*, 202 U. S. 246, is we think plainly unfounded. Those cases involved State legislation as to a subject over which there was complete State authority, that is the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that THE APPLICATION OF THOSE CASES TO A SITUATION WHERE COMPLETE POWER IN A STATE, OVER THE SUBJECT DEALT WITH, DOES NOT EXIST, has since been so repeatedly passed upon as to cause the question not to be open. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman*

Co. v. *Kansas*, ib. 56; *Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and *Herndon* v. *C., R. & I. P. Ry.*, 218 U. S. 135."

There is then no authority at all at the present time for the proposition that an interstate telegraph company, having been invited within the State and allowed with the sanction of the State to accumulate property and build up a permanent business therein, may be ARBITRARILY ousted from the privilege of domestic business; and on the contrary it is thoroughly settled that such an arbitrary ouster is a violation of the commerce clause, as well as of the contract and due process clauses, of the Federal Constitution.

(2)

Appellee a Federal postal agent.

In the peculiar case of this appellee, there is an additional reason why it cannot be ousted from domestic business in the State. The bill alleges (Record, pp. 2, 3), and the demurrer admits, that on June 8, 1867, appellee filed with the Postmaster General of the United States its written acceptance of the Act of Congress approved June 24, 1866, 14 Stat. 221, c. 230 (Rev. Stat. §§ 5263-5268), and has at all times since then fully performed all obligations and requirements of said act, and as a part of the postal equipment of the United States and as an instrumentality of the postal department of the United States carried upon its lines of telegraph messages for the government of the United States, for the several departments thereof, and for the people of the State of Wisconsin, as prescribed and required in and by the provisions of said act.

Even as to purely domestic traffic therefore it is not within the power of the State of Wisconsin to

prohibit the operation of the appellee's lines; and—especially as there is no exception of governmental business in the act under consideration—it must necessarily be void as applied to this appellee.

Pensacola Tel. Co. v. *W. U.*, 96 U. S. 1.
W. U. Tel. Co. v. *Texas*, 105 U. S. 460.
W. U. Tel. Co. v. *Massachusetts*, 125 U. S. 530.
Williams v. *Talladega*, 226 U. S. 404.

In *Telegraph Company* v. *Texas* (*supra*, 105 U. S. 460, 464), it was said:

> "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a Government agent for the transmission of messages on public business."

In *Western Union Telegraph Company* v. *Massachusetts* (*supra*, 125 U. S. 530, 554), it was distinctly stated that in the case of a telegraph company which has accepted the Act of July 24, 1866, the State could not interfere by any specific statute to prevent it "from placing its lines along these post roads, OR STOP THE USE OF THEM AFTER THEY WERE PLACED THERE"; that

> "If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

This principle was reaffirmed, and the case of *Western Union* v. *Massachusetts* expressly recognized as a binding authority in support of it, as

recently as in the case of *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 78:

> "HOLMES, J. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a State could not stop the operation of the lines by an injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. *Williams* v. *Talladega*, 226 U. S. 404, 415, 416."

In *Williams* v. *Talladega* (*supra*), the peculiar standing of this appellee as a governmental agency was again recognized, and an ordinance imposing a license tax on domestic business, without excepting business for the Federal government, was held invalid (226 U. S. 404, 419):

> "Were it otherwise, an agency of the Federal government, in the execution of its sovereign power, would be at the mercy of the taxing power of the State. It is enough in this connection to refer to the cases of *McCulloch* v. *Maryland*, *supra*; *Osborn* v. *Bank*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1; *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91.
>
> "We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an

essential part of the public business—communication between the officers and departments of the Federal government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole and makes the tax unconstitutional and void."

In *Pensacola Tel. Co.* v. *Western Union* (*supra*, 96 U. S. 1, 8), it was said:

"Congress has power * * * to establish post offices and post roads * * * Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the

> general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation. * * * It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness."

In *Mercantile Trust Co.* v. *Texas and Pacific Railway Co.*, 216 Fed. Rep. 225 (affirmed 223 U. S. 710 on the authority of the Herndon case, *supra*), the question was as to the validity of a constitutional provision of Louisiana attempting to bar from the State the Texas and Pacific Railway Company, a Federal corporation, in case it should remove a suit to the Federal court. The following is from the opinion in the court below (p. 230):

> "Congress has, therefore, adopted the defendant company as an agency or instrumentality, in carrying out the powers vested in Congress. * * * The services which Congress proposes to obtain, by means of the railroad, cannot be economically and efficiently obtained unless the railroad is vested with power, not only to perform the peculiar services required by the Government, but also to engage in the general business of a common carrier. Congress has, therefore, made use, not merely of the railroad, but of the railroad as a common carrier, in all the branches of the business of a common carrier, for its own purposes. * * *

> "It is clear that when Congress has the power, under the Federal Constitution, to adopt and use, for the convenience of the operations of the Federal Government, a corporation of any kind as its agency, in such case a State legislature cannot, in any manner, interfere with the operations of such agency so employed by Congress for Federal Governmental purposes. The States cannot deny to these Federal corporations the right to enter the States, or do business in the States. Neither can they announce conditions for noncompliance with which the Federal corporations will be excluded from the States. And it is inconceivable that the States could exclude from their borders the Federal corporations used as Government agencies when those corporations decline to surrender their right to litigate in the Federal Courts.
>
> "I am clear, therefore, that the constitutional amendment is invalid and without effect as to the Texas & Pacific Railway Company."

If the Texas & Pacific Railway Company is a governmental agent, so also and for kindred reasons is the appellee. Its purely domestic operations within the State, if authorized by Congress under the post roads clause, cannot be prohibited by the State, regardless of any question of interstate commerce or vested rights. Certainly, as to appellee, a State act of this character would in any event be void for making no distinction between domestic business generally and business done in pursuance of its obligation to act as a direct agency for the Federal government.

CONCLUSION.

The temporary injunction order should be affirmed with costs.

Respectfully submitted,

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